Filed 2/22/19 P. v. Mercado CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MERCADO, Defendant and Appellant.	H045155 (Santa Clara County Super. Ct. No. C1490405)

Defendant Ruben Mercado pleaded no contest to two counts of forcible rape against two victims in exchange for the dismissal of other charges, the dismissal of four multiple victim allegations, and a 14-year prison sentence. After entering his plea and before sentencing, defendant sought unsuccessfully to recuse the Santa Clara County District Attorney's Office (the D.A.'s Office) and to withdraw his plea on grounds that plea counsel had been ineffective. On appeal, he challenges the denial of those motions, as well as the trial court's refusal to hold an evidentiary hearing on the plea withdrawal motion. We affirm.

I. BACKGROUND

A. Factual Summary[1]

Trish Doe was a criminal investigator with the D.A.'s Office. She dated defendant between 2008 and 2011. Several times between January 2010 and December 2011, defendant raped Trish. During at least one of those rapes, defendant was drunk and choked her. Trish went on special status with the District Attorney's Office, meaning she stopped coming into the office, in mid-March 2012. On April 4, 2012, she reported the rapes to the San Jose police. She told officers she might have previously disclosed the rapes to Linda H., a co-worker at the D.A.'s office. Trish said she decided to come forward, in part, because of a conversation with another victim. Shortly after reporting the rapes, Trish was diagnosed with cancer. She was unsure whether she wanted to pursue charges against defendant. Accordingly, in January 2013, the investigation into her report was suspended. Trish formally retired from the District Attorney's Office on March 29, 2013.

Christine Doe also dated defendant. On the weekend of November 2 and 3, 2013, she and defendant went to Lake Tahoe with friends, including Elizabeth N., who had known defendant for 14 years. Elizabeth did not notice anything out of the ordinary on that trip. She saw Christine in a bikini and a halter top that weekend and noticed no bruises. In the days following the trip, however, Christine informed Elizabeth by email that defendant had physically abused her. Christine specifically disclosed a fight that took place on October 31, 2013, the Thursday before the Tahoe trip, during which she said defendant had choked her. Christine stated in one email that she did not "want to leave out any detail" of her issues with defendant; she did not disclose any alleged rape or other sexual assault to Elizabeth. In an email dated November 6, 2013, Elizabeth told

[1] Because defendant entered his plea prior to a preliminary hearing, the facts are taken from police reports and declarations submitted in connection defendant's post-plea motions.

Christine that defendant had dated a Santa Clara County detective named Trish. Elizabeth wrote that she thought Trish had threatened to get a restraining order against defendant. Elizabeth later declared that, in her estimation, the information she provided Christine would have been sufficient for Christine to locate Trish. On December 13, 2013, Christine reported to Los Gatos police that defendant had choked and raped her on Halloween of that year. She told police that a "Santa Clara County Deputy" named "Trish" or "Donna" may also have been assaulted by defendant.

In July 2014, Los Gatos police interviewed Trish in connection with their investigation of Christine's reported rape. Trish said that when she initially reported the rapes, San Jose Police Detective John R. had "helped her through the process to report the incident, but maintain her privacy." She said John was later hired by the D.A.'s Office as an investigator. Trish also disclosed that she had spoken with two of defendant's other ex-girlfriends, referred to in the police report as V3 and V4, and had learned that defendant had "d[one] the same things to all of them." Trish also stated that she had found in defendant's possession pictures and videos depicting V3, V4, and other women, which were sexual in nature. Trish provided Los Gatos police officers with contact information for V3 and V4.

Los Gatos police subsequently interviewed V3 and V4. V4 told police that she had dated defendant, who she described as a physically abusive alcoholic. V4 said that defendant had grabbed her by the throat and forced her to have sex. V3 provided few details, saying only that defendant had done things to her that he apparently had done to other women.

In January 2015, Trish called Patrick S., a friend of defendant's with whom she and defendant had socialized in 2010 and 2011. Patrick declared in July 2017 that, during the January 2015 phone conversation, Trish told him that defendant had assaulted her and another woman and that she was seeking additional information that might be relevant to the case. Patrick knew Trish had been an investigator when she was dating

defendant and Patrick "thought" Trish might have been working with the police or an investigator on the case.

B. Procedural History

A felony complaint filed in Santa Clara County Superior Court on August 7, 2014 charged defendant with forcible rape of Christine Doe (Pen. Code, § 261, subd. (a)(2);[2] count 1); forcible oral copulation of Christine Doe (former § 288a, subd. (c)(2)(A) (now § 287, subd. (c)(2)(A)); count 2); assault of Christine Doe by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 3); and forcible rape of Trish Doe (§ 261, subd. (a)(2); count 4). The complaint alleged that the counts involving Christine Doe took place on October 31 and November 1, 2013 and that the rape of Trish Doe took place between February 1, 2011 and May 1, 2011. Multiple victims were alleged as to all counts. (§ 667.61, subds. (a) & (e)). Each multiple victim allegation exposed defendant to a possible 15-year-to-life sentence. (§ 667.61, subds. (b), (c)(1), (c)(7), (e)(4).)

On April 25, 2016, defendant pleaded no contest to the two rape charges—counts 1 and 4—in exchange for the dismissal of the other charges and the multiple victim allegations and a 14-year prison sentence. The disposition was negotiated by defense counsel Sam J. Polverino and Deputy District Attorney Charles Gillingham. During the negotiations, Polverino and Gillingham discussed the fact that there were two other potential victims and an Evidence Code section 1108 victim. Polverino believed that charges involving the two additional victims would be added to the complaint after the preliminary hearing, making plea negotiations more difficult and any agreement less favorable to defendant.

With the assistance of new counsel, defendant moved to withdraw his plea and to recuse the D.A.'s Office on August 5, 2016. Both motions were denied. On September

[2] All further statutory references are to the Penal Code unless otherwise noted.

8, 2017, the trial court sentenced defendant to the upper term of eight years on count 1 and the middle term of six years on count 4 for a total term of 14 years, as called for by the plea agreement. The court dismissed counts 2 and 3 and the multiple victim allegations at that time. Defendant timely appealed and obtained a certificate of probable cause from the superior court allowing him to challenge the validity of his plea on appeal.

II. DISCUSSION

Defendant asserts three claims of error on appeal. First, he argues that the trial court abused its discretion in denying his post-plea motion to recuse the D.A.'s Office. Second, he contends the trial court abused its discretion in denying his motion to withdraw his plea. Third, he says the trial court erred in refusing to hold an evidentiary hearing in connection with the plea withdrawal motion. Each claim of error is meritless, for the reasons described below.

A. The Trial Court Did Not Err in Denying the Motion to Disqualify the D.A.'s Office

1. Background

The thrust of defendant's motion to recuse the D.A.'s Office was that one of the alleged victims—Trish—had improperly contacted other witnesses in an effort to influence their testimony and that she had done so at the direction of and/or using the resources of the D.A's Office. In support of that motion, defendant submitted declarations from an investigator and a researcher, both employed by defense counsel.

The investigator declared that defendant's friend Patrick told him that Trish had contacted him and "said that [defendant] had been arrested for sexual assault against two women including herself and that she was investigating any allegations of incidents with other women." According to the investigator, Patrick said that Trish asked for "incriminating evidence to 'help her case' " and "asked whether [defendant] had raped [Patrick's] wife." Attached to the investigator's declaration were police reports documenting Trish's statements to police. According to those police reports, Trish told,

officers that she had talked to V3 and V4. Specifically, Trish told officers that she knew who V3 was because V3 and defendant were dating when Trish first met defendant. Trish further explained that while she and defendant were dating, V3 sued defendant. Trish accompanied defendant to a court date in that lawsuit. There, she met a court-appointed mediator or "middleman," who—at some point—put her in contact with V3. The researcher's declaration largely consisted of excerpts from the police reports attached to the investigator's declaration related to Trish's contacts with other potential witnesses.

The Attorney General opposed the disqualification motion, arguing that the declarations defendant had submitted in support of his motion contained only hearsay, such that they should be stricken. The Attorney General supported his opposition with declarations from the deputy district attorneys assigned to defendant's case. Deputy District Attorney Gillingham declared that he knew who Trish was when she worked at the D.A.'s Office, but that he did not recall ever working on a case or socializing with her. He further declared that he treated Trish like any other victim and that no one ever suggested that she be given special treatment. Deputy District Attorney Alison Filo, who filed the case against defendant, declared that Trish had been a sexual assault investigator for the D.A.'s Office "at some point during the almost seven years" that Filo prosecuted sexual assault cases. However, Filo declared that she did not recall ever working on a case with Trish. Filo declared that the two were not personal friends, although they did go to lunch together once when Filo taught a class for investigators that Trish attended. Like Gillingham, Filo declared that she treated Trish like any other victim and that no one ever suggested that she be given special treatment.

The trial court denied the motion on two independent grounds. First, the court concluded that defendant failed to support his motion with the statutorily required "affidavits of witnesses who are competent to testify to the facts set forth in the affidavit" (§ 1424, subd. (a)(1)), reasoning that his supporting declarations contained only hearsay. Second, the court concluded that, even assuming the declarants were competent to testify

to the statements in their declarations, defendant had failed to demonstrate that any conflict of interest made a fair trial unlikely.

1. Legal Principles and Standard of Review

Section 1424, subdivision (a)(1) provides that "a motion to disqualify a district attorney from performing an authorized duty . . . may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." The same provision requires that a motion to disqualify a district attorney "be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit." (§ 1424, subd. (a)(1).)

" 'The statute "articulates a two-part test: '(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?' " ' [Citation.] The defendant 'bear[s] the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People's prerogative to select who is to represent them.' [Citation.] That burden is especially heavy where, as here, the defendant seeks to recuse not a single prosecutor but the entire office. [Citations.]" (*People v. Trinh* (2014) 59 Cal.4th 216, 229.)

"A conflict under section 1424 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is "actual," or only gives an "appearance" of conflict.' [Citation.] However, for recusal to be granted, defendant must demonstrate that fair treatment by the office is unlikely." (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479-1480 (*Cannedy*).)

On appeal, we review the trial court's factual findings for substantial evidence and its order denying the motion to disqualify for abuse of discretion. (*Melcher v. Superior Court* (2017) 10 Cal.App.5th 160, 165 (*Melcher*).)

2. Defendant Fails to Carry His Burden to Show the Trial Court Erred in Denying the Motion on Grounds it was Unsupported by Competent Evidence

Defendant does not address one of the two bases on which his motion was denied—his failure to submit affidavits of witnesses competent to testify to their contents—let alone demonstrate that basis is legally incorrect. " 'Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error.' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) As defendant does not even attempt to carry that burden, we must affirm the denial of defendant's motion to disqualify.

3. The Trial Court Did Not Err in Denying the Motion for Failure to Show a Fair Trial was Unlikely

Even disregarding the inadequacy of defendant's supporting declarations, the trial court did not abuse its discretion in denying the motion to disqualify the entire D.A.'s Office for failure to show that it was unlikely that defendant would receive a fair trial absent that "extreme step." (*Cannedy*, *supra*, 176 Cal.App.4th at p. 1481 ["Recusal of an entire district attorney's office is an extreme step"]; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578-1579 (*Merritt*) [" '[t]he recusal of an entire prosecutorial office is a serious step, imposing a substantial burden on the People, and the Legislature and the courts may reasonably insist upon a showing that such a step is necessary to assure a fair trial.' "].)

Defendant argues that disqualification was required because three potential witnesses were current or former D.A. Office employees—complaining witness Trish and two people she might have spoken to about her allegations, Linda and John. But "[r]ecusal of an entire district attorney's office is not appropriate merely because one or more deputy district attorneys [or D.A. Office staff members] are witnesses in the case." (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 678 (*Hernandez*); *Merritt*, *supra*, 19

Cal.App.4th at p. 1580 ["It is well settled that merely because an employee may be a potential witness and credibility of that witness may have to be argued by the prosecuting attorney, there is no sufficient basis for that reason alone to recuse an entire prosecutorial office"].)

The added fact that Trish was an alleged victim likewise does not compel the conclusion that denial of the motion was an abuse of discretion. In *Cannedy*, the defendant was charged with false imprisonment by violence, attempted sexual battery, and sexual battery based on incidents in which he allegedly made sexual advances towards and inappropriately touched two victims. (*Cannedy*, *supra*, 176 Cal.App.4th at p. 1478.) A stenographer employed by the D.A.'s Office was a potential witness who "would testify about uncharged similar acts by defendant." (*Ibid.*) And "other district attorney's office employees . . . might conceivably testify . . . with regard to her credibility." (*Id.* at p. 1491.) The Court of Appeal held that the trial court erred in recusing the entire Alameda County District Attorney's Office. (*Id.* at p. 1489.) *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368 (*Trujillo*) involved a prosecution for attempted escape and assault. Immediately after the defendant was convicted of murder, he attempted to run out of the court house. That escape attempt was foiled by a deputy district attorney, who tackled the defendant and sustained injuries in an ensuing struggle during which the defendant attempted to strangle him with his own necktie. The trial court denied a motion to recuse the San Francisco District Attorney's Office. (*Id.* at p. 370.) The Court of Appeal found no abuse of discretion. (*Id.* at p. 373.)

People v. Conner (1983) 34 Cal.3d 141 and *People v. Jenan* (2006) 140 Cal.App.4th 782 (*Jenan*), on which defendant relies, are distinguishable. In each of those cases, the trial court *granted* a motion to recuse the district attorney's because a deputy district attorney witnessed the crime for which the defendant was being prosecuted. On appeal, no error was found under the applicable and "deferential abuse of discretion test." (*Jenan*, *supra*, at p. 793 ["we defer to the sound exercise of the court's discretion"].)

Applying that same deferential standard of review here, we likewise find no abuse of discretion.

Defendant's reliance on *People v. Vasquez* (2006) 39 Cal.4th 47 is similarly misplaced. There, the defendant's mother and stepfather were employees of the Los Angeles County District Attorney's Office and the assigned deputy district attorney stated that those family relationships had influenced her decision not to accept a defense proposal for a bench trial. (*Id*. at pp. 52, 57-58, fn. omitted.) Our Supreme Court concluded that the trial court erred in denying the defendant's motion to recuse that entire office, reasoning that while "the fact one or two employees of a large district attorney's office have a personal interest in a case would not [ordinarily] warrant disqualifying the entire office," "[t]he admitted role Vasquez's family relationship with [Los Angeles County District Attorney's Office] employees played in influencing the prosecutor's conduct of the case demonstrated a likelihood defendants would not be treated fairly by [that office] at all stages of the criminal proceedings, requiring the office's recusal." (*Id.* at pp. 57-58.) By contrast, here, there is no evidence that Trish's former employment by the D.A.'s Office influenced the conduct of the assigned prosecutors.

Defendant also argues that recusal was required here because Trish was "a member of the prosecution team [who] used her power, authority, resources and experience as a law enforcement officer, while employed in the District Attorney's Office and after, to track down, contact, interview, befriend, influence and collude with every ex-girlfriend she could find, as well as other witnesses." He also implies that others at the D.A.'s Office knew of her alleged misconduct, faulting them for failing "to do anything about it." But the record does not support the assertion that Trish used D.A. Office resources to contact potential witnesses. And even assuming Trish engaged in misconduct, the record does not support the implication that anyone at the D.A.'s Office was aware of her actions.

The evidence shows that Trish spoke with Patrick in January 2015, nearly three years after she last came into work at the D.A.'s Office. There is no evidence that Trish used D.A. Office resources to contact Patrick, who she knew from when she dated defendant. Given the timing of Trish's contact with Patrick and her preexisting relationship with him, the evidence does not give rise to a reasonable inference that Trish used D.A. Office resources to contact Patrick.

The evidence shows Trish knew who V3 was through defendant and contacted her by way of a court-appointed mediator that Trish met when she accompanied defendant to a court date in V3's lawsuit against him. The foregoing evidence does not give rise to a reasonable inference that Trish used D.A. Office resources to contact V3.

The evidence shows that Trish was in touch with V4 in 2014. There is no evidence as to how Trish contacted V4. Nor is there any evidence that Trish was in touch with V4 while she was working at the D.A.'s Office. The foregoing evidence does not give rise to a reasonable inference that Trish used D.A. Office resources to contact V4.

There is no evidence that Trish and Christine ever were in contact, let alone that Trish used D.A. Office resources to contact Christine.

Below, defendant was more faithful to the record, arguing only that it was "possible that [Trish's] contacts [with other potential witnesses] happened while Trish Doe was working at the D.A.'s Office" and that it was "possible that [she] used proprietary access to gain information" about those potential witnesses. But such "sheer speculation does not constitute sufficient evidence of potential bias to recuse an entire prosecutorial office from a case." (*Hernandez*, *supra*, 235 Cal.App.3d at p. 680.)

Even assuming that Trish misused D.A. Office resources to investigate her own case, there is no evidence that anyone else at the D.A.'s Office was aware of that conduct, let alone condoned or sanctioned such behavior. Under those circumstances, recusal is not required. In *Merritt*, an investigator with the Los Angeles County District Attorney's Office withheld exculpatory material, suggested to a witness that she commit perjury, and

made sexual advances towards that witness. (*Merritt, supra*, 19 Cal.App.4th at p. 1577.) The investigator also was a potential witness. (*Id*. at p. 1578.) The trial court granted a motion to recuse the entire Los Angeles County District Attorney's Office. The Court of Appeal held that ruling was an abuse of discretion given that the investigator had been removed from and insulated from further action in the case and that "no attorney was involved or faulted with respect to any of the alleged activity of" the investigator. (*Id*. at p. 1580.) Similarly, here, Trish has not been in a position to take any action in the case since at least her retirement in March 2013. And no attorney was involved in her alleged misconduct. Under *Merritt*, recusal of the entire D.A.'s Office was not required.

Lewis v. Superior Court (1997) 53 Cal.App.4th 1277, which defendant cites, is factually inapposite. In that case, the Orange County auditor-controller sought to recuse the Orange County District Attorney from prosecuting him for misconduct in office during the period preceding the county's 1994 bankruptcy. (*Id*. at p. 1280.) The Court of Appeal concluded that the trial court erred in denying that motion given that (1) the auditor-controller remained "in a position to make decisions which affect the operations of the office of the district attorney"; (2) the office of the district attorney was "a direct victim of the losses resulting from the county's bankruptcy, and thus of [the auditor-controller's] alleged misconduct, because of resulting drastic cuts in its budget"; (3) "[t]he district attorney and his staff were personally affected by the bankruptcy"; and (4) there existed "evidence potentially implicating the district attorney in the alleged misconduct which led to the county's financial disaster." (*Id*. at pp. 1283-1284.) By contrast, here, neither the D.A.'s Office itself, nor all its employees, were victims of the charged crimes. Nor is the district attorney implicated in any wrongdoing.

People v. Dekraai (2016) 5 Cal.App.5th 1110 (*Dekraai*), raised by defendant on reply, is likewise not on point. There, the Court of Appeal affirmed an order recusing the entire Orange County District Attorney's office from prosecuting the defendant's penalty phase after he pleaded guilty to eight counts of murder. (*Id*. at p. 1114.) [T]he recusable

conflict of interest, a divided loyalty, [was] based on the [Orange County District Attorney's] intentional or negligent participation in [the Orange County Sheriff's] covert [confidential informant] program[, which sought] to obtain statements from represented defendants in violation of their constitutional rights, and to withhold that information from those defendants in violation of their constitutional and statutory rights." (*Id*. at p. 1148.) The "institutional interests and structural incentives between the [Orange County District Attorney's office, which prosecutes crimes,] and the Sheriff[, who investigates those same crimes] constituted a genuine conflict of interest" in *Dekraai*. (*Id*. at p. 1146.) The same *institutional* interests and *structural* incentives cannot be said to exist here, between the D.A.'s Office and a *single former* investigator. Moreover, in *Dekraai*, "there was sufficient evidence the [Orange County District Attorney's office] was not only aware the Sheriff maintained a CI program in which it moved CIs near targeted represented defendants to obtain statements but that it also failed on many occasions to produce information, or provided incomplete information, to defendants about the CIs who were obtaining the information." (*Ibid*.) There is no evidence of such complicity by the D.A.'s Office here.

Finally, defendant contends that disqualification was necessary because "the prosecution never showed" that Trish, John, and Linda were walled off from the case. "Ethical walls are an accepted means of reducing the likelihood of a disabling conflict." (*Melcher*, *supra*, 10 Cal.App.5th at p. 167.) But the establishment of such a wall is not required whenever the potential for a conflict exists. The burden was on defendant to show that a wall was required to ensure fair treatment, not on the prosecution, as defendant suggests. He did not carry that burden. Trish retired from the D.A's office before the case was filed, so the suggestion that she needed to be walled off is nonsense. And there is no evidence that Linda or John had any involvement in the prosecution.

For all the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying defendant's disqualification motion.[3]

B. The Trial Court Did Not Err in Denying the Motion to Withdraw the Plea

Defendant moved to withdraw his plea on ineffective assistance of counsel grounds. He asserted that prior counsel was ineffective in (1) not seeking to recuse the D.A.'s Office, (2) not advising defendant that Trish had contacted "favorable witnesses for the defense and . . . attempt[ed] to prejudice them against" defendant, and (3) not discovering and/or advising defendant as to the possibility that Trish and Christine were in contact before Christine went to the police.[4] That motion was denied, a ruling defendant challenges as an abuse of discretion.

1. Legal Principles and Standard of Review

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v.*

---

[3] It is also worth noting that defendant moved to recuse the D.A.'s Office *after* he already had pleaded no contest pursuant to a negotiated plea agreement. "A negotiated plea agreement is a form of contract . . . ." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) The D.A.'s Office was bound by the plea agreement. (*People v. Segura* (2008) 44 Cal.4th 921, 930-931 [" ' "When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." ' "].) Accordingly, it is unclear whether any prosecutorial discretion remained to be exercised by the time defendant moved for recusal. And if no such discretion remained, we struggle to see how defendant could show recusal was necessary to prevent likely unfair treatment by the D.A.'s Office going forward.

[4] The third contention was raised in a motion for reconsideration of the denial of defendant's motion to withdraw based on assertedly new evidence—the emails between Elizabeth and Christine and Elizabeth's declaration that she gave Christine enough information to locate Trish before Christine went to police.

Washington (1984) 466 U.S. 668, 687 (*Strickland*).) "[T]he two-part *Strickland* . . . test applies to challenges to guilty pleas based on ineffective assistance of counsel." (*Hill v. Lockhart* (1985) 474 U.S. 52, 58 (*Hill*).) The deficient performance component requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Strickland, supra,* at p. 688.) When a claim of ineffective assistance of counsel is raised in the context of a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill, supra,* at p. 59.)

"[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." (*Hill, supra,* 474 U.S. at p. 59.) Other factors pertinent to the prejudice inquiry include "whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* [not] have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938 (*Alvernaz*).)

"We review the denial of a motion to withdraw a plea for an abuse of discretion." (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.)

2. Counsel's Failure to Move to Disqualify the D.A.'s Office

For the reasons discussed above in connection with the post-plea recusal motion, a pre-plea recusal motion would have been futile. Therefore, counsel's failure to file such a motion cannot constitute ineffective assistance of counsel. (*People v. Price* (1991) 1 Cal.4th 324, 387, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"].)

3. Counsel's Knowledge of and Advice Regarding a Potential Defense

Defendant also faults plea counsel, Polverino, for failing to advise him of (and advising him to accept the plea despite) a "viable defense"—namely, that Trish fabricated her allegations against defendant and convinced Christine, V3, and V4 to do the same. Defendant says that Polverino was ineffective because he failed to recognize that the evidence supported a reasonable inference that Trish and Christine were in touch before Christine reported the alleged rape. And, relatedly, defendant contends that Polverino was ineffective in advising him to accept the plea on the mistaken premise that it would be difficult to defend against similar allegations made by two women who did not know each other.

The record shows that Polverino *was* aware of a possible defense theory that the alleged victims were lying to exact revenge on defendant. In a November 21, 2014 motion to set reasonable bail, Polverino asserted: "All of the complaining witnesses know each other, all have discussed their cases with each other and all recently became aware of a box of videos and pictures of [defendant] with other women including boudoir photographs. Some of the sex videos were taken allegedly against their will and involved other women. This discovery appears to be the catalyst for their disclosure." At a December 4, 2014 hearing on that motion, Polverino argued that the case was an "unusual" one in that "all of the alleged complaining witnesses . . . know each other . . .

and all to some degree are now joined together in their dislike of [defendant]" after learning he had not been faithful. Polverino referred to the victims as an "ex-girlfriends group [or] club." Defendant was present in court during that hearing. Accordingly, the record refutes defendant's claim that Polverino was unaware of (or failed to advise him as to) a defense theory that the allegations were fabricated by women who, at least by late 2014, knew each other.

Defendant says that Polverino was ineffective because he failed to recognize (and advise defendant) that there was circumstantial evidence that Trish and Christine were in touch *before* Christine reported the alleged rape. At best, the evidence only weakly supports such an inference. Before Christine reported the assault to police, Elizabeth told Christine that defendant had dated a Santa Clara County detective named Trish and provided Christine with information that may have been sufficient to locate Trish. That evidence raises the *possibility* that Trish and Christine were in contact before Christine when to police. But, when Christine made her police report, she said that there was another potential victim who was a "Santa Clara County Deputy" named "Trish" or "Donna." Christine's uncertainty regarding Trish's name and mistake as to her job title supports the inference that the two women had not spoken, and Christine merely repeated the information she had received from Elizabeth. If Trish and Christine had been in contact, then Christine likely would have gotten those identifying details about Trish correct. Polverino's failure to advise defendant of and/or encourage him to advance a weak circumstantial defense to charges that could put him in prison for life did not constitute deficient performance.

Even assuming that counsel acted unreasonably by not advising defendant regarding the possible pre-report connection between Trish and Christine, such that defendant has satisfied the performance prong of his ineffective assistance claim, he fails to demonstrate prejudice. To do so, he must show that, if properly advised, he would have rejected the plea and gone to trial. Had defendant proceeded to trial on the forcible

rape, forcible oral copulation, and assault by means of force likely to produce great bodily injury charges, and the associated multiple victim allegations, he faced multiple 15-year-to-life sentences. (§ 667.61, subds. (b), (c)(1), (c)(7), (e)(4).) The plea bargain guaranteed him a comparatively light 14-year sentence. Defendant now says he would have forgone that favorable outcome and defended himself at trial based on circumstantial evidence that the allegations were fabricated by jilted ex-girlfriends seeking revenge after learning of his unfaithfulness and secret sex videos. We are not persuaded. As discussed above, the record shows defendant was aware of that potential defense when he decided to take the plea bargain. And we are unconvinced that defendant would have changed course based on evidence that Elizabeth told Christine about Trish's existence before Christine went to police.

C. Refusal to Allow Live Testimony on Motion to Withdraw Plea

The trial court denied defense counsel's request to allow Polverino and Trish to testify in connection with the motion to withdraw the plea. Defendant's challenge to that ruling is meritless.

As a general matter, there is no requirement that the trial court hold an evidentiary hearing on every motion to withdraw a plea. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 201 [" 'There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony.' [Citation.]"].)

Here, the live testimony defendant sought was irrelevant, such that the court's ruling was not prejudicial error. As to Polverino, defendant argues that "it was significant for the court to know what the attorney was aware of and not aware of, and why he decided a motion to recuse the District Attorney, in his opinion, was not viable." Given the trial court's conclusion that disqualification was not warranted, Polverino's decision not to bring such a motion was neither deficient performance nor prejudicial,

regardless of the state of Polverino's knowledge. Accordingly, the trial court did not err in declining to allow Polverino to testify in that regard.

Defendant further contends that Polverino should have been allowed to testify as to what defendant suggest is a disparity between the evidence and Polverino's view of the case. Defendant says: "the evidence showed that the complaining witnesses had contact with each other and so could have colluded with each other and made their respective stories match, or even fabricated the allegations of rape. But Polverino thought two women who did not know each other were accusing Appellant of similar conduct and so a trial would certainly result in a conviction." In reality, there was no such disparity about which Polverino could have testified. As discussed above, there was no direct evidence that Trish and Christine were in touch before either of them went to police.

As to Trish, defendant says she should have been permitted to testify as to whether she contacted Christine before Christine made her report to the police. Any such testimony would have been irrelevant to the issues before the court—namely, whether Polverino rendered deficient performance by failing to advise defendant of a defense theory that the allegations were fabricated and whether defendant suffered prejudice. The reasonableness of Polverino's advice must be measured based on the state of the evidence at the time. Likewise, in assessing prejudice, we consider "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer . . . ." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

III. DISPOSITION

The judgment is affirmed.

_____

ELIA, ACTING P. J.

WE CONCUR:

_____

MIHARA, J.

_____

GROVER, J.

People v. Mercado
H045155